Supreme Court, U.S.
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No. 93-1854

In The

Supreme Court of the United States

October Term, 1993

PHILLIP M. KABEALO,

Petitioner,

v.

HUNTINGTON NATIONAL BANK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF PARTIES AND RULE 29.1 LIST OF AFFILIATES

The parties before the Court of Appeals and this Court are listed in the action.

The Huntington National Bank is a national banking association, and is wholly owned by its parent corporation, Huntington Bancshares Incorporated, a publicly-owned corporation. The Huntington National Bank has nine wholly-owned subsidiaries and no subsidiaries that are not wholly owned. One of The Huntington National Bank's wholly-owned subsidiaries, HNB Clearing, Inc., has a non-wholly owned subsidiary, The Check Exchange System Co.

Huntington Bancshares Incorporated has the following subsidiaries:

The Huntington National Bank
The Huntington National Life Insurance Company
Huntington Bancshares Financial Corporation
Huntington Capital Corp.
Huntington Bancshares Indiana, Inc.
The Huntington Acceptance Company
Union Commerce Leasing Corporation
Huntington Bancshares Michigan, Inc.
Heritage Service Corp.
Huntington Bancshares Ohio Inc.
Seventeen Corporation
Huntington Bancshares West Virginia, Inc.
The Huntington Service Company
The Huntington State Bank
The Huntington Community Development Corporation
Huntington Bancshares Kentucky, Inc.
Money Station, Inc.

LIST OF PARTIES AND RULE 29.1
LIST OF AFFILIATES – Continued

The Huntington Financial Services Company
The Huntington Asset Management Company
Huntington Federal Savings Bank

Many of these subsidiaries themselves have subsidiaries.

The foregoing are wholly-owned subsidiaries of Huntington Bancshares Incorporated, with the exception of The Huntington National Life Insurance Company and Money Station, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent The Huntington National Bank respectfully requests that this Court deny the Petition for a Writ of Certiorari seeing review of the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 17 F.3d 822 (6th Cir. 1994). The opinion of the district court is unreported.

SUMMARY OF ARGUMENT

Petitioner seeks review of the decision of the Court of Appeals for the Sixth Circuit affirming the district court's decision granting summary judgment in favor of Respondent. Petitioner asserts two issues for review: whether, when ruling on a motion for summary judgment, a court should construe facts in a light most favorable to the non-moving party when the non-moving party has claimed an exception to the statute of limitations; and whether the court deprived Petitioner of his Seventh Amendment right to a jury trial. Neither ground advanced by Petitioner presents any substantial issue for review by this Court.

With respect to Petitioner's claim that the court construed facts against him because he was relying on an exception to the statute of limitations, Petitioner never raised the question below and it was not passed on by the appellate court. Therefore, this Court should decline to consider the issue. Furthermore, nothing in the decisions of the appellate court or the district court indicates that either court did not construe the facts most favorably to Petitioner. Petitioner's argument is based solely on the inclusion in the appellate court's decision of a quotation, without discussion, from the appellate court's prior decision in *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974). Petitioner had cited the very case, including the matter quoted, to the appellate court as authority upon which he relied. Although the Court of Appeals for the Sixth Circuit did not err, if it had done so, Petitioner invited the error and should not obtain review now on claimed error that he invited.

The Court of Appeals for the Sixth Circuit's decision is in accordance with the decisions of this Court and does not conflict with the decision of any other federal appellate court. Petitioner has not brought to the Court's attention a single case in conflict with the appellate court's decision.

What Petitioner really claims, stripped of verbiage, is that genuine issues of material fact should have precluded summary judgment in Respondent's favor. Both the district court and the appellate court, however, found to the contrary. Despite Petitioner's claims to this Court, he still is unable to point to a specific, genuine issue of material fact in dispute because there is none. Petitioner mistakes his conclusory averments that his damages were "unprovable" for an issue of fact.

With respect to Petitioner's claim that he was deprived of his Seventh Amendment right to a jury trial, Petitioner did not raise this issue below and, accordingly, it should not be considered by this Court. Furthermore, the law is well-settled that summary judgment does not violate a constitutional right to jury trial. Therefore, review of this issue is unwarranted.

REASONS FOR DENYING THE PETITION

Petitioner has asserted that this case presents two legal issues: whether the facts are to be construed in a light most favorable to a party opposing a motion for summary judgment when that party asserts an exception to the statute of limitations; and whether the trial court deprived Petitioner of his Seventh Amendment rights

when it did not allow a jury to determine whether "the damages" were speculative. Petition for a Writ of Certiorari ("Petition") at i.

In reality, this case presents neither question now raised by Petitioner. Although cloaked in terms of burdens of proof and constitutional rights, all Petitioner really claims, despite the rulings to the contrary by both the district court and the appellate court, is that he presented enough evidence to the trial court to create a factual issue as to whether the statute of limitations should have been tolled, and thus summary judgment against him was not proper. However, Petitioner is unable to point to any specific factual issue, because none exists.

Petitioner's ruse is revealed by Petitioner's total failure to raise in the Court of Appeals for the Sixth Circuit *either* question he has presented for review by this Court.[1] To the contrary, Petitioner argued to the Court of Appeals for the Sixth Circuit for application of the legal standard that he now says is in question.

In the proceedings below, the trial court held, and the appellate court affirmed, that Petitioner's claims under the Bank Holding Company Act, 12 U.S.C. § 1971 *et seq.*, were barred by the applicable four-year statute of limitations set forth in 12 U.S.C. § 1977(1). Both courts agreed that Petitioner's causes of action had accrued more than

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[1] Petitioner frames his Petition in terms of law applied and error committed by the Court of Appeals for the Sixth Circuit; however, the Court of Appeals for the Sixth Circuit applied the same standards, and reached the same result, as the district court.

four years prior to the commencement of this case and that Petitioner had failed to prove that he was entitled to application of the rule set forth by this Court in *Zenith Radio Corp. v. Hazeltine Research. Inc.*, 401 U.S. 321 (1971). In *Zenith*, an antitrust action, this Court phrased the issue before it as:

> [W]hether it is consistent with the controlling limitations statute, 15 U.S.C. § 15b, to permit Zenith to recover all of the damages it suffered during the years 1959-1963 even though some undetermined portion of those damages was the proximate result of conduct occurring more than four years prior to the filing of the counterclaim.

401 U.S. at 333. This Court concluded in the affirmative: that because Zenith's damages were not capable of proof at any time during the four-year limitations period, Zenith could sue to recover those damages within four years from when they were suffered. 401 U.S. at 341. In response to Respondent's motion for summary judgment, made on the grounds that Petitioner's claim was barred by the statute of limitations, Petitioner sought to invoke the *Zenith* doctrine. Both the district court and the appellate court held that Petitioner was not entitled to an exception to the application of the statute of limitations under Zenith because Petitioner's damages were provable.[2]

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[2] Respondent contended in both the trial court and appellate court proceedings, and still contends, that the rule set forth in *Zenith* does not apply to claims brought under the Bank Holding Company Act, 12 U.S.C. § 1971 *et seq.* The Court need not consider this contention in connection with denial of the Petition, because the Petition should be denied regardless of whether Zenith applies to the Bank Holding Company Act.

I. THE COURT OF APPEALS ACTED IN ACCORDANCE WITH APPLICABLE LAW ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

A. The Appellate Court Did Not Construe Facts Against Petitioner.

Petitioner states that this case presents the issue of whether the facts are to be construed in a light most favorable to a party opposing a motion for summary judgment when that party asserts an exception to the statute of limitations. It does not present this question.

Nothing in the decisions of the trial court or the appellate court indicates that either court construed the facts in any way other than in a light most favorable to Petitioner. In its decision, the district court noted:

> In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." Inferences to be drawn from the underlying facts contained in such materials must also be considered in the light most favorable to the party opposing the motion.

Petition at 17a. Nothing in the district court's decision indicates that it applied any other standard to any evidentiary materials presented by either party. When Petitioner brought his appeal to the Court of Appeals for the Sixth Circuit, he did not raise as error that the district court had not applied the proper standards under Rule 56 of the Federal Rules of Civil Procedure when that court granted Respondent's motion for summary judgment.

Similarly, the appellate court's decision indicates that the appellate court did not construe the facts of this case in any manner other than in a light most favorable to Petitioner. The Court of Appeals for the Sixth Circuit did not reiterate the standards for summary judgment, most likely because Petitioner had not raised on appeal any issue as to how the district court should have construed the facts. The Court of Appeals for the Sixth Circuit's failure to make a wooden recitation of the requirements under Rule 56, however, is not tantamount to application by that court of erroneous standards.

Attempting to manufacture a question for review, Petitioner relies in this Court on the appellate court's discussion of the allocation of the burden of proof for a claimed exception to the statute of limitations. The appellate court cited its decision in *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974), for the proposition that the party seeking the benefit of an exception to the statute of limitations has the burden of proof to establish the exception, with all presumptions against him because his claim is founded on exceptions. 17 F.3d at 827; Petition at 9a. The district court had cited and quoted *Akron Presform* for the same proposition in its decision. Petition at 21a.

Petitioner apparently claims, based *solely* on this reference to *Akron Presform*, that the Court of Appeals for the Sixth Circuit construed the evidence against him when it reviewed the district court's decision granting summary judgment in Respondent's favor. Nothing in the appellate court's decision, however, indicates that either the appellate court or the district court construed any evidence most strongly in favor of Respondent or against

Petitioner.[3] Both the district court and the appellate court merely concluded that Respondent had failed to establish any entitlement to an exception to the statute of limitations under *Zenith*, because his damages were provable. Despite their references to *Akron Presform*, neither court raised or relied upon any presumption or inference against Petitioner. Accordingly, Petitioner has no basis whatsoever for stating that this case presents an issue of whether he was entitled to have the evidence construed most strongly in his favor.

B. Petitioner Did Not Raise Below The Error He Now Asserts.

Despite the district court's reference to *Akron Presform's* "with all presumptions against him," Petitioner did not seek review (or even raise an issue) in the Court of Appeals that the district court had improperly construed evidence against him. The appellate court, accordingly, never considered the issue, strongly indicating that this Court should deny Petitioner's Petition. *See Patrick v. Burgett*, 486 U.S. 94, 99 n.5 (1988) ("This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court."); *City of Canton v. Harris*, 489 U.S. 378, 386 n.5

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[3] Respondent does not concede that the Court of Appeals would have committed error if it had considered presumptions against Petitioner or construed disputed evidence against Petitioner with regard to the claimed exception to the statute of limitations. However, because the court plainly did not do so, the issue is immaterial.

(1989) (claim not presented to and passed on by court of appeals will not be considered).

Respondent further notes that the Court of Appeals for the Sixth Circuit applied exactly the law urged on it by Petitioner. In his Brief of Appellant filed with that court, Petitioner stated:

> The Sixth Circuit has stated the rule relied upon by Plaintiff to recover for the Bank's 1982 tying conduct as follows:
>
> > A Plaintiff may recover damages occurring within the period of the statute of limitations that are the result of conduct occurring prior to that period, if at the time of the conduct, those damages were speculative, uncertain or otherwise incapable of proof. *Akron Presform Mold Company v. McNeil Corporation*, 496 F.2d 230 at 233, *cert. denied*, 419 U.S. 997 (1974).
>
> However, the Plaintiff in such a case has the burden of proving that the exception to the statute of limitations applied with all presumptions against him. *Id.*
>
> . . .
>
> Since Plaintiff filed the complaint in November of 1988, the Plaintiff bore the burden of proving that the *Zenith* exception applied.

Kabealo v. Huntington National Bank, No. 92-4359, Brief of Appellant at 30. Petitioner should not be heard to protest to this Court that the Court of Appeals for the Sixth Circuit in its decision repeated the identical statement of law upon which Petitioner expressly stated in his brief that he relied. A party cannot complain on appeal of

alleged error that he invited. *See Glassman Construction Co. v. United States*, 421 F.2d 212 (4th Cir. 1970); *Capella v. Zurich General Accident Liability Insurance Co.*, 194 F.2d 558, 560 (5th Cir. 1952); *Orenstein v. United States*, 191 F.2d 184, 193 (1st Cir. 1951).

C. The United States Courts Of Appeals Are Not In Conflict.

In support of his Petition, Petitioner also argues that the decision of the Court of Appeals for the Sixth Circuit "conflicts with the decisions of this Court and of other Circuits." Petition at 9. Petitioner's claim is incorrect.

Petitioner states that the appellate court's decision conflicts with this Court's decisions requiring that facts be construed in a light most favorable to the party opposing a motion for summary judgment. Petition at 9. However, and as set forth above, the Court of Appeals for the Sixth Circuit did not construe the facts against Petitioner. It merely reiterated (in a statement of the law with which Petitioner agrees) that because Petitioner relied upon an exception to the statute of limitations, Petitioner bore the burden of demonstrating that he was entitled to an exception to the statute of limitations. The appellate court's decision does not conflict with any decision of this Court on the applicable standards for summary judgment or as to the provable damages doctrine set forth in *Zenith*.

Petitioner's "conflict of circuits" argument is equally inaccurate. The authorities relied upon by Petitioner for a "conflict of circuits" are, with one exception, district court cases rather than appellate court cases, and none has any relevance to the questions supposedly presented

in this case. *Hildebrand v. Hildebrand*, 736 F. Supp. 1512 (S.D. Ind. 1990) did not address the *Zenith* rule in any regard, and did not even address an exception to the statute of limitations. Rather, *Hildebrand* was concerned with when a cause of action accrues under Indiana law; the court could not conclude as a matter of law that plaintiff had ascertained the existence of her injuries more than two years prior to commencement of the litigation. The *Hildebrand* court expressly noted that "when a defendant seeks summary judgment on statute of limitations grounds, 'it becomes incumbent upon the plaintiff to present facts raising a genuine issue in avoidance of the statute of limitations.' " 736 F. Supp. at 1522. Even if *Hildebrand* were a decision of a United States court of appeals, nothing in *Hildebrand* conflicts with the decision of the court of appeals in the present case.

In re Professional Financial Management, Ltd., 703 F. Supp. 1388 (D. Minn. 1989), relied upon by Petitioner, similarly does not demonstrate any conflict among the circuits. In this district court case, at issue was whether plaintiffs had raised a factual dispute as to when they discovered defendant's fraud for purposes of invoking federal equitable tolling of the statute of limitations for their securities violation claims. The *Professional Financial Management* court ruled that plaintiffs had the burden of proving their entitlement to the federal equitable tolling doctrine, and had raised a reasonable factual dispute as to when they had discovered the alleged fraud of defendants, precluding summary judgment. Again, even if *Professional Financial Management* were an appellate decision, it does not conflict with the present case.

Sheets v. Burman, 322 F.2d 277 (5th Cir. 1963), also relied upon by Petitioner, is Petitioner's only federal appellate decision cited for a conflict of circuits. In *Sheets*, a medical malpractice action, defendants had moved for summary judgment on the grounds that the statute of limitations had expired. Although expressly acknowledging that summary judgment was an appropriate mechanism for disposing of claims barred by the applicable statute of limitations, the *Sheets* court concluded that factual disputes regarding the date of termination of the physician-patient relationships and regarding fraudulent concealment precluded summary judgment. *Sheets* does not conflict in any way with the decision of the Court of Appeals for the Sixth Circuit here.

Petitioner also suggests that *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912 (S.D.N.Y. 1955) creates a conflict of circuits. *Walder*, again, is a district court case. In *Walder*, an antitrust action, defendants had moved for summary judgment on the grounds of the statute of limitations; plaintiffs argued that the statute of limitations should be tolled because defendant corporations were absent from the state. The parties wrangled over the extent to which defendants were conducting business in the state or had sufficient contacts to be considered present in the state. The *Walder* court concluded that some defendants' reliance upon the allegations of the complaint was insufficient; as to another defendant, the court found that the court could not conclude that no genuine issue of fact was present. *Walder*, again, adds nothing to Petitioner's argument that the courts of appeals are in conflict over the law relevant to this case. No such conflict exists.

D. No Disputed Factual Evidence Was Construed Below.

Although Petitioner complains that the Court of Appeals for the Sixth Circuit (and, presumably, the district court that ruled against Petitioner in the first instance) deprived him of his right to send disputed factual issues to the jury, this case presents no genuine issues of material fact relevant to the statute of limitations. Although arguing in his Petition that "[c]redible, probative evidence on a material issue was kept from a jury because a judge was not persuaded by the dry presentation of facts," Petition at 18, Petitioner is unable to point to a single issue of fact in dispute, much less any fact that was construed against him by any court. The trial court noted that the facts were largely uncontroverted when, instead of setting out the facts, it merely observed that "[t]he facts in this case have been thoroughly set out in the parties' July 19, 1992 final pretrial order." Petition at 14a. The Court of Appeals for the Sixth Circuit did not note any disputed or conflicting factual issues, because none were present.

No one disputed in any court that Petitioner had prepared and submitted to Respondent, long before the expiration of the statute of limitations, income and cash projections from Petitioner's business. No one disputed that he had operated the landfill for more than four years prior to expiration of the statute of limitations. No one disputed the process for applying for a permit from the Ohio EPA or the dates of completion of the various stages of the process. Petitioner's only dispute is legal: based upon the undisputed facts,' were his alleged damages

provable under the legal standards for proof of future damages.

Although Petitioner seeks to raise before this Court the question of how evidence should be construed, there simply is no evidence to construe. Were this case returned to the Court of Appeals for the Sixth Circuit, that court necessarily would reach the same result.

In *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), this Court discussed the obligation of a court ruling on a motion for summary judgment under Rule 56 to resolve factual disputes in favor of the moving party. In *Lujan*, the court of appeals had felt constrained to resolve ambiguities in an affidavit in favor of the non-moving party for purposes of summary judgment. Justice Scalia, writing for the Court, stated:

> That is not the law. In ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the non-moving party" only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that general averments embrace the "specific facts" needed to sustain the complaint.
>
> . . . [The appellate court's approach] converts the operation of Rule 56 to a circular promenade: plaintiff's complaint makes general allegations of injury; defendant contests through Rule 56 existence of specific facts to support injury; plaintiff responds with affidavit containing general allegations of injury, which must be

> deemed to constitute averment of requisite specific facts since otherwise allegation of injury would be unsupported (which is precisely what defendant claims it is).

Lujan, 497 U.S. at 888-89.

Here, despite protesting that the court of appeals did not construe the evidence most strongly in his favor, Petitioner is unable to point to a single instance "where the facts specifically averred by [Petitioner] contradict facts specifically averred by [Respondent]," *Lujan*, 497 U.S. at 888, so that the district court erred in granting summary judgment for Respondent. Simply stated, there were no specific facts material to Respondent's motion for either the district court or the Court of Appeals for the Sixth Circuit to construe most favorably to Petitioner. Neither court was obliged to find Petitioner's general, conclusory and credibility-straining averments that his damages were "too speculative" or "unprovable," reiterated before this Court as well, so as to bring himself within the *Zenith* doctrine.

Petitioner has cited no authority whatsoever for his underlying assumption that whether damages are provable is a question of fact for the jury. Petitioner cites *Wilson v. Johns-Mansville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982) and *Hildebrand* for the proposition that "certainty of damages is a material issue to be decided by a jury." Petition at 14. However, neither *Wilson* nor *Hildebrand* stands for that proposition. In *Wilson*, the court faced the issue of when the statute of limitations began to run on separate, distinct and later-manifested diseases engendered by exposure to asbestos. Applying a discovery rule, the court concluded that the statute of

limitations would begin to run when the separate disease became manifest. Notably, the *Wilson* court treated its analysis as a matter of law, not a matter of fact. In *Hildebrand*, the court concluded that factual issues existed over when plaintiff *ascertained* she was damaged, not when her damages became certain. Neither *Wilson* nor *Hildebrand* lend support to Petitioner's stated proposition, and neither decision addresses the issue of whether the ability to prove damage is a question of fact.

Although the courts addressing the *Zenith* rule have not ruled specifically on the point, whether future damages are unprovable clearly has been treated as a question of law, not a question to be submitted to a trier of fact. Therefore, Petitioner was not entitled to have a jury decide whether his damages were provable in any event. In *Zenith* itself, this Court stated that the matter of whether future damages were provable ordinarily would depend on the "informed discretion" of the district judge; however, in view of the prolonged litigation between the parties, the Court determined that this Court could fairly dispose of the issue itself. *Zenith*, 401 U.S. at 340-41. The *Zenith* Court then analyzed the evidence of damages that Zenith hypothetically might have presented and concluded that the claims of future damage "would have probably gotten short shift in the lower courts." *Id.* at 342. Notably, this Court did not return the issue to the district court, sitting as a trier of fact, for a factual, evidentiary showing of the parties on whether Zenith's damages were provable.

The other courts considering the applicability of the *Zenith* doctrine have similarly treated the issue of provable damages as a question of law for the court rather

than a question of fact for the trier of fact. In *Lancianese v. Bank of Mount Hope*, 783 F.2d 467 (4th Cir. 1986), a case brought under the antitying provisions of the Bank Holding Company Act, defendant bank successfully moved for summary judgment on the statute of limitations, a judgment upheld by the appellate court. Plaintiffs argued, among other things, that the *Zenith* rule extended their statute of limitations. The appellate court concluded, much as the district court and court of appeals did here, that plaintiffs "could have reasonably ascertained their damages and presented competent proof of them." *Lancianese*, 783 F.2d at 470. In *Brunswick Corporation v. Riegel Textile Corporation*, 752 F.2d 261 (7th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985), the applicability of the Zenith doctrine was concluded on a motion to dismiss, strongly indicating that the court viewed the question as legal, not factual. Affirming dismissal of the complaint, the Court of Appeals for the Seventh Circuit stated: "The *Zenith* principle is particularly out of place in this case; for the nature of Brunswick's complaint is such that it could have gotten complete compensation in a suit brought in 1972 with much less uncertainty than is usual in antitrust damage actions." *Brunswick Corp.*, 752 F.2d at 271. The applicability of a Zenith exception to the statute of limitations was decided on motion for summary judgment in *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1986), *Akron Presform*, and *Jackson v. Union National Bank*, 715 F. Supp 892 (C.D. Ill. 1989), also suggesting that the inquiry is legal rather than factual. Thus, the decisional law supports the conclusion that is both logical and intuitive – that whether damages are

provable is a question of law for the court rather than a factual issue for the trier of fact.

This approach is consistent with other established legal principles. The trial judge has long been invested with the responsibility for determining whether as a matter of law evidence is sufficient to support a claim for future damages. *See. e.g., Grantham and Mann v. American Safety Products,* 831 F.2d 596 (6th Cir. 1987) (affirming judgment notwithstanding the verdict; damages awarded by jury bore no discernible relationship to the evidence presented and must have been the product of speculation). No useful purpose is served by having a jury speculate on what a plaintiff could have proved under legal principles of future damages had a plaintiff been inclined to do so. As is illustrated above, the cases relied upon by Petitioner for denial of a motion for summary judgment brought on a statute of limitations defense because of disputed factual issues are wholly inapposite: on what date a party actually ascertained the existence of damages (*Hildebrand);* whether a party had actual knowledge of fraud or used reasonable diligence to discover it (*Professional Financial Management*); whether a defendant was transacting business in the state (*Walder*); and the date on which a physician-patient relationship terminated (*Sheets*). Petitioner has cited no case in which a court denied summary judgment because of a factual issue on the applicability of the *Zenith* doctrine. Petitioner's entire approach is, for this reason, misguided.

II. THIS CASE PRESENTS NO QUESTION OF VIOLATION OF PETITIONER'S RIGHT TO A JURY TRIAL

Petitioner also insists that this case presents the question whether "the court" deprived Petitioner of his Seventh Amendment rights when it did not allow a jury to determine whether "the damages" were speculative. Petition at i. In his Petition, Petitioner specifically states that his grievance on this point is with the Court of Appeals for the Sixth Circuit. Petition at 18. Petitioner has failed to present an issue that merits review.

A. Petitioner Failed To Raise The Issue Below.

First, the district court (and not the Court of Appeals for the Sixth Circuit) granted summary judgment in favor of Respondent and thereby precluded Petitioner from presenting his case at a jury trial on the merits. Petitioner did not raise to the appellate court, and the appellate court did not pass on, any assertion that Petitioner somehow had been deprived of a right to a jury trial, strongly militating against review of the issue by this Court. *See Patrick*, 486 U.S. at 99 n.5; *City of Canton*, 489 U.S. at 386 n.5. Despite Petitioner's lengthy argument, Respondent cannot comprehend how the Court of Appeals for the Sixth Circuit deprived Petitioner of a jury trial that had been obviated, without subsequent complaint for deprivation of his constitutional rights, in the district court.

B. The Law Is Well Settled That Summary Judgment Does Not Violate Constitutional Rights.

Second, Petitioner cites no authority, and Petitioner has no authority, for the proposition that a grant of

summary judgment (or, in the case here of the Court of Appeals for the Sixth Circuit, affirmance of a lower court's grant of summary judgment) violates a constitutional right to jury trial. To the contrary, it is well settled that when summary judgment has been properly granted, no jury-trial issue arises under the Seventh Amendment to the United States Constitution. *See Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440, 1447 (9th Cir. 1987); *Itel Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253, 1261 (11th Cir. 1983); *Barrett v. Independent Order of Foresters*, 625 F.2d 73, 75 (5th Cir. 1980); *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir. 1974); *United States v. Strangland*, 242 F.2d 843, 848 (7th Cir. 1957). Accordingly, Petitioner should not be granted review of this case on the basis that he was deprived of a jury trial. Little purpose would be served by this Court entertaining review of a matter of well-settled law on which the federal appellate courts (as well as the state courts and federal district courts) are in agreement.

This Court recently touched upon the very jury-trial issue raised here by Petitioner in *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986):

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex, 477 U.S. at 327. As the *Celotex* Court recognized, a party's right to have genuine issues of material fact tried

by a jury is not violated by summary judgment. Petitioner has no constitutional right to present claims lacking any factual basis to a jury.

CONCLUSION

Petitioner has failed to show any conflict between the decision of the Court of Appeals for the Sixth Circuit and prior decisions of this Court or of any other federal court. Petitioner has failed to show any other basis for this Court to hear this case. The decision of the Court of Appeals for the Sixth Circuit is consistent with applicable law and does not warrant review on any grounds. Respondent respectfully requests that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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